

COLLECTION OF INFORMATION CONCERNING POTENTIAL SOURCES
INTELLIGENCE CHARTER ISSUE PAPER FOR THE
SPECIAL COORDINATION COMMITTEE

I. Background: It is the purpose of this paper to present for SCC consideration and resolution issues relating to the collection of information concerning United States persons without their consent when such persons are determined by United States intelligence entities to be potential sources of information or operational assistance. Since there appears to be no serious objection to collection of information concerning United States persons who have agreed to provide assistance and have consented to such collection or who are being considered for employment or as contractors with an intelligence entity, even utilizing false credentials to conceal the intelligence interest because of the nature of the activity for which assistance is sought, these two types of collection are not discussed further below.

The issues presented relate to whether charter legislation should:

a. Authorize collection of information concerning United States persons who are identified as potential sources of information or assistance without their consent;

b. Limit the length of time during which such collection without consent may be conducted; and,

c. Limit the means by which such collection without consent may be conducted.

II. Current Practice: United States persons who may be in a position to provide information or assistance to an intelligence entity may come to its attention in a variety of ways including chance encounters, recommendations from existing sources, official inquiries and positive efforts to seek out persons with particular types of contact or capabilities.

Executive Order 12036 provides that information that is not available publicly may be collected without the consent of the United States person concerned when that person is reasonably believed to be a potential source or contact, but only for the purpose of determining suitability or credibility. Such collection activities are required to be conducted subject to the order's restrictions on the use of various collection techniques and pursuant to procedures approved by the Attorney General. The required procedures, while under development, have not yet been finalized or implemented.

When a United States person who may be a useful source or contact is identified, preliminary inquiries may be made without the knowledge or consent of that person in order to determine whether to attempt to solicit the person's assistance. During this preliminary stage, a review of publicly available information may be conducted, requests may be made for reviews of the records of the intelligence entity and other entities, and inquiries may be made to establish or confirm identity or suitability. To make these potential sources aware of the intelligence interest and objective before assessing their veracity, reliability, loyalty, and receptiveness is to risk premature disclosure and frustration of the objective, undue exposure of the identities of the intelligence employees involved, or the subsequent failure of the activity itself due to difficulties with the source that could have been anticipated as a result of a preliminary inquiry.

When it appears that the United States person has the requisite contacts or capabilities, and may be a suitable prospect (a benchmark that may take varying lengths of time to reach depending upon the circumstances of each case) the person's assistance is solicited and the intelligence, or, in limited circumstances abroad, the United States Government, interest is revealed. If the person agrees to cooperate, consent is obtained for further inquiries.

III. Issue - Whether Consent Should Be Required: Under Executive Order 12036, nonpublic information may be collected concerning United States persons who are reasonably believed to be potential sources or contacts without their consent. The order does not require that such collection be approved at any particular level of authority within the collecting entity. However, such collection is limited under the order by the restrictions on the use of various techniques and by the requirement that collection be limited to that information necessary to determine suitability or credibility and be conducted pursuant to procedures approved by the Attorney General.

The Senate bill, S. 2525, would have authorized collection of information concerning a United States person reasonably believed to be a potential source of information or operational assistance to the extent necessary to determine suitability or credibility. The consent of the subject would be required except where a designated official of the intelligence entity collecting the information has determined there to be a serious intention to utilize the United States person as a source and that requesting consent would jeopardize the activity for which the assistance of the United States person is to be sought. The SSCI has continued to maintain this position in its most recent (November 1978) statement of the intended conduct of charter legislation.

A general requirement, with narrow exceptions, to obtain the consent of any United States person believed to be a potential source or contact prior to collecting non-public information as to that person's suitability would be intended, obviously, to limit the numbers and circumstances of unconsented collection activities of this type. Rather than proceeding without consent in all cases, a careful determination would be required in each case as to whether to obtain the subject's consent and only a select number of such collection activities likely would be conducted without such consent.

In opposition it may be argued that such a requirement is needless since the collection would be self-limiting (i.e., information necessary to determine "suitability" or "credibility") and the most threatening collection techniques (i.e., electronic surveillance and monitoring, physical searches and mail surveillance) would not be available for this purpose. Further, a requirement that consent be obtained except where security concerns militate against requesting it, may be ineffectual and the exception might quickly become the rule since preliminary collection of one degree or another is necessary in virtually all cases to determine whether the assistance and consent of the person should be requested.

The alternatives appear to include:

Option A - Require consent in all cases prior to any collection of nonpublic information to determine suitability or credibility of a U.S. person as a potential source or contact;

Option B - Require such consent as a general rule coupled with authority for officials at appropriate levels of the entity to invoke exceptions in cases where there is some concern as to the subject's suitability or credibility;

Option C - Do not require consent but leave it to limited authorizing language and the restricted means by which it may be accomplished to regulate unconsented collection;

Option D - Do not require consent in statute but leave it to entity procedures approved by the Attorney General to limit the nature and extent of such collection.

IV. Issue - Limitations on the Time Allowed for Unconsented Collection: If it is determined that some degree of collection should be authorized without the consent of the United States

person who is the potential source or contact, another issue is raised concerning whether a time limit should be imposed on such collection activities.

Executive Order 12036 includes no such time limit.

The Senate bill would have limited all collection for such purposes, apparently whether consented or unconsented, to 90 days without exception and without provision for renewal or extension. The most recent SSCI position paper advocates "strict time limits."

A time limit on collection of this type would be intended to prevent extended gathering and accumulation of information concerning any unwitting United States person merely on the basis of an intention to utilize the person as a source or contact at some future date. Requiring that all such collection cease after 90 days would require that only a limited, specific inquiry be conducted and would discourage overbroad collection activities.

The difficulty with such a time limit, especially where no provision is allowed for extension or exception, is that it presumes a precise and focused dedication of resources and fails to recognize the realities or practicalities of this type of collection. Merely requesting, receiving and assimilating information in the records of selected federal agencies may frequently require over 30 days, especially when the United States person has had extensive foreign contacts. Such a time limit would effectively bar such collection if it were to include in the 90-day limit the collection that occurs after the consent of the subject is obtained since such background investigations often require a minimum of 180 days.

The alternatives appear to include:

Option A - Impose a specific time limit, such as 90 or 180 days, on unconsented collection of non-public information to determine the suitability or credibility of a U.S. person as a potential source or contact;

Option B - Impose such a limit on unconsented collection of this type but allow officials at appropriate levels of the entity to invoke exceptions or allow extensions and renewals;

Option C - Impose no time limit on such collection but leave it to the finiteness of available resources, the non-availability of the most intrusive techniques, and the language of the authorizing provision to narrow the type and amount of information that may be

collected and thus the period of time during which collection will continue; or, ..

Option D - Include no time limit in statute, leaving it to procedures approved by the Attorney General to regulate the duration of such collection.

V. Issue - Restrictions on the Means By Which Unconsented Collection May Be Accomplished: A determination that unconsented collection of nonpublic information to determine the suitability or credibility of United States persons as potential sources or contacts should be authorized also results in an issue concerning whether there should be statutory limits on the means by which such collection may be conducted.

Executive Order 12036 does not limit collection of public information and does not include specific limitations on techniques for collection of nonpublic information that concerns a United States person's suitability or credibility as a potential source or contact. However, the conditions imposed by that Order on the use of electronic surveillance and monitoring, physical search and mail opening, and mail surveillance, effectively prohibit the utilization of any of those techniques (except that physical surveillance may be used by the FBI "in the course of a lawful investigation") to collect information concerning an unconsenting United States person because that person is considered to be a potential source or contact.

The Senate bill would have gone further and limited collection for this purpose to gathering of publicly available information, requests for existing information from the records of federal agencies, and "interviews" (not defined but apparently understood to mean individual inquiries without disclosure of the intelligence or United States Government affiliation of the person initiating the inquiry).

It is argued in support of such restrictions that this type of collection should be strictly limited because the United States persons involved may not only have violated no law, but may not even be in possession of information of foreign intelligence or counterintelligence value. Yet they may be subjected to scrutiny by the government because of mere circumstance or acquaintance. On the other hand, such limitations on techniques are opposed as impractical and unnecessary since there will be sufficient limitations on the type of information to be collected, and the use of the most intrusive techniques will be effectively prohibited for this purpose. Accordingly, the practical difficulties raised by arbitrarily limiting the remaining means of

collection, and the definitional problems (e.g., what is "publicly available," what are "interviews") outweigh the benefit to be gained.

The alternatives appear to include:

Option A - Impose no additional limitations on use of particular techniques to collect nonpublic information concerning the suitability or credibility of United States persons who are potential sources or contacts without their consent;

Option B - Impose no additional limitations on such collection but note that electronic surveillance or monitoring, physical search and mail opening, and mail surveillance may not be used for this purpose;

Option C - Limit collection for this purpose to public information, "national agency checks," and "interviews" as in S. 2525;

Option D - Limit collection for this purpose by specific reference to all or some of the additional techniques available, such as acquiring "public" and "nonpublic" information, pretextual and third-party interviews, physical surveillance, incidental collection, inquiries to existing or newly-developed sources, and national agency checks; or,

Option E - Include no limitations on techniques in statute but leave it to procedures approved by the Attorney General and restrictions on intrusive techniques to regulate these collection activities.